Supreme Court, U.S.
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No. 89-100

In The

Supreme Court of the United States

October Term, 1989

NEW JERSEY TRANSIT RAIL OPERATIONS, INC.,

Petitioner,

vs.

JOSEPH P. FITCHIK, LINDA A. DeGIROLAMO, FELIX A. GUZMAN, SIDNEY KINNEAR, KENNETH G. BANTA, WILLIAM ROCKWELL, ROBERT K. HEATON, WILLIAM P. McKENNA, ANDY M. SEAMON, CRAIG A. CONLON, LAURENCE O'HALLORAN, DENNIS MARTIN, ROBERT G. STOCKER, SR., CLIFFORD E. WILLIAMSON, DAVID J. CHWASZCSEWSKI, ASHRAF GHOBRIAL, LOUIS D. ELLIS, WILLIAM HAZELTON, GEORGE FEATHERMAN, JOSEPH L. DUFFY, JAMES C. HARDEN, JR., EDWARD J. FLILLER, PHILIP ROXAS, CRAIG A. CONLON,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Whether Certiorari should be denied where the Third Circuit Court of Appeals, *en banc*, followed the principles and guidelines established by this Court concerning how to determine if an entity is entitled to "alter ego" status under the Eleventh Amendment to the Constitution, where the decisions of this Court establish a clear and workable standard to guide the lower courts how to make the "alter ego" determination, where that standard was followed by the Third Circuit and is also uniformly followed by the other circuits, and where this uniform standard led the Third Circuit to the factual conclusion, under the particular facts and the unique governmental and statutory scheme involved in this case, that the Petitioner, the parent corporation of an interstate railroad, was not the "alter ego" of the State because a judgment against it would have no impact on the State treasury, the State was not obligated to pay money judgments rendered against the railroad, the railroad had the ability to raise its own funds to pay any judgments, the railroad had authority to purchase liability insurance to protect itself from judgments, and further, because the railroad was sufficiently autonomous from the State?

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STATEMENT OF THE CASE

Respondents, members of various railroad crafts and employees of Petitioner, have filed individual FELA complaints, 45 U.S.C. §§ 51 et seq., in the United States District Court for the District of New Jersey against the Petitioner, an interstate railroad operating in the Northeast corridor. All of the Respondents alleged that they sustained injuries during the course of their interstate railroading employment on behalf of Petitioner, as a result of, *inter alia*, Petitioner's negligence. The Respondents all sought money damages.

These actions were dismissed by several district court judges on the grounds that the Petitioner could not be sued in federal court because of the Eleventh Amendment to the Constitution. The United States Court of Appeals for the Third Circuit, *en banc*, reversed these dismissals because it concluded that the Petitioner was not entitled to Eleventh Amendment protection.

The Petitioner operates an interstate commuter railroad which was owned and operated by Consolidated Rail Corporation (Conrail) until January 1, 1983. New Jersey Transit Rail Operations, Inc. (NJT), a subsidiary of the Petitioner, was established to accept the railroad equipment and facilities which were transferred from Conrail without consideration. NJT now operates the interstate commuter system in accordance with federal laws. *The Northeast Rail Service Act of 1981*, P.L. 97-35, Title XI, August 13, 1981, 45 U.S.C. § 744a; 45 U.S.C. § 586(g); 45 U.S.C. § 1104(3); 4 *U.S. Code Congressional and Administrative News* 4512-13 (1982). NJT is, in all respects, a traditional railroad in that it is subject to the regulations

of the Federal Railroad Administration, has employees who are members of traditional railroad labor unions vis-a-vis public employee unions and performs the same functions and activities as did Conrail when it operated the same railroad lines.

SUMMARY OF ARGUMENT

This Court has established clear principles and guidelines to be followed by the lower courts when determining whether an entity is an "alter ego" of a State entitled to Eleventh Amendment immunity from suit in federal courts. To assist in making this determination, the Circuit Courts of Appeals have identified several criteria to be examined, in light of the facts unique to each entity claiming "alter ego" status, as well as the particular statutory and governmental structures within which that entity operates. The criteria used by the different circuits, and the relative weight given to each criterion, are substantially similar and consistent with the principles and guidelines established by this Court. The lower courts do not need further guidance by this Court. Likewise, Petitioner's assertion that there is a conflict and divergence in the way that the circuits evaluate "alter ego" issues, is illusory. On the contrary, the circuits are substantially similar in their approach to "alter ego" questions. Action by this Court to supervise the lower courts, in their handling of this issue, is unnecessary. This case does not involve any issue of special importance or national concern which warrants review by this Court. No Rule 17 issue exists in this case.

The Petitioner's request that this Court review and second guess the Court of Appeals' analysis of the particular and unique facts of this case is misplaced. It is not the role of this Court, in our federal system, to review each factual determination. This Court should reject Petitioner's invitation to review each "alter ego" case which will subsequently arise.

ARGUMENT AGAINST GRANTING THE WRIT OF CERTIORARI

I. Introduction.

It is respectfully submitted that this Petition be denied because this case does not present any special or important issues for review. The issues claimed by the Petitioner to exist are illusory at best and do not present matters of the significance suggested by Rule 17. Instead, the dispute in this case revolves around the unique facts of this case, the specific statutory framework within which this particular entity was created and operates, and the application of this Court's clearly enunciated legal standards to those particular facts.

II. This Court Has Established Uniform Standards By Which Courts Of Appeals Can Determine Whether An Entity Is The "Alter Ego" Of The State For Eleventh Amendment Purposes.

Petitioner inaccurately suggests that this Court has not previously established criteria to assist the lower courts in determining whether an entity is the "alter ego"

of the state for Eleventh Amendment purposes.[1] In fact, this Court's prior decisions establish constitutional principles and specific and workable guidelines for the lower courts to follow, to effectuate those principles. This Court has consistently held,

> "[The] nature of a suit as one against the state is to be determined by the essential nature and effect of the proceeding. [Citations omitted.] And when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity . . . " *Ford Motor Co. v. Department of Treasury of the State of Indiana*, 323 U.S. 459, 464 (1945).

In addition to finding "alter ego" status where "the judgment sought would expend itself on the public treasury or domain," this Court also permits the finding of "alter ego" status where the effect of the judgment is to interfere with public administration. *Dugan v. Rank*, 372 U.S. 609, 620 (1963).

While both factors are relevant to determining "alter ego" status, the impact of the lawsuit on the public funds in the state treasury is the most important factor. *Edelman v. Jordan*, 415 U.S. 651, 663 (1974); *Lake County Estates v.*

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[1] An entity, even if not the state itself, is protected by the Eleventh Amendment if it is found to be the "alter ego" of the state. Note, *A Practical View of the Eleventh Amendment – Lower Court Interpretation and the Supreme Court's Reaction*, 61 *Georgetown L. Rev.* 1473, 1484 (1973).

Tahoe Regional Planning Agency, 440 U.S. 391, 400-01, (1979).[2]

The lower courts have uniformly analyzed potential "alter ego" entities with the purpose of determining whether a judgment will impact on a state treasury or interfere with a state's internal operations.

III. There Is No Confusion Among The Circuits Concerning How To Evaluate Entities For "Alter Ego" Purposes. The Circuits' Approaches To The "Alter Ego" Analysis Are Similar And All Circuits Rely On The Uniform Criteria Established By This Court.

The divergence which Petitioner claims exists among the circuits is illusory. The circuits follow the command of, *inter alia*, *Ford Motor Co.*, supra; *Dugan*, supra; *Edelman*, supra; and *Lake County*, supra, when evaluating entities to determine whether they are entitled to "alter ego" status. The circuits uniformly evaluate entities, which claim Eleventh Amendment protection, by determining if a judgment against the entity will impact on the state treasury or interfere with the state's internal policy machinery.

Petitioner cites sixteen (16) cases which it claims demonstrate the absence of uniformity among the circuits. A careful evaluation of these cases reveal that they

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[2] The emphasis on the financial impact that a lawsuit will have on a state treasury is justified by the history and basic purpose of the Eleventh Amendment which was to protect state treasuries and prevent the states' potential financial disaster. 61 *Georgetown L.Rev.*, supra at 1486, n.8 (1973).

do not demonstrate the absence of uniformity; but, on the contrary, a homogeneous approach to "alter ego" analysis.[3] The cases cited by Petitioner all utilize similar approaches, and evaluate the entities using similar criteria to determine whether the entity is entitled to Eleventh Amendment protection consistent with principles of federalism.

A detailed review of the criteria utilized by the courts in the cases cited by Petitioner will demonstrate the illusory nature of the alleged conflict:

Kashani v. Purdue University, 813 F.2d 843 (7th Cir. 1987) (recognized that the most important factor is the extent of the entity's fiscal autonomy from state; inquires whether judgment would impact on state treasury; considered state's oversight and control over entity's fiscal affairs; considered ability of entity to independently raise funds; considered whether entity is subject to state taxation; considered whether state would have to increase appropriations in response to a judgment); *Harden v. Adams*, 760 F.2d 1158 (11th Cir. 1985) (considered status of entity under state law; considered degree of state control over the entity; considered fiscal autonomy of entity;

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[3] Three of the cases cited by Petitioner are irrelevant to the "alter ego" issue. In *Clay v. Texas Women's University*, 728 F.2d 714 (5th Cir. 1984) and *Martin v. University of Louisville*, 541 F.2d 1171 (4th Cir. 1976), it was admitted that the entity was entitled to "alter ego" status and therefore, they contain no pertinent evaluation or discussion of "alter ego" determination. In *Long v. Richardson*, 525 F.2d 74 (6th Cir. 1975), the court did not decide the "alter ego" issue, but solely based its decision on a finding of voluntary waiver.

considered whether the entity's budget must be submitted for state approval; considered whether a judgment will be paid from state treasury; considered availability of entity's own funds to pay a judgment); *Hall v. Medical College of Toledo*, 742 F.2d 299 (6th Cir. 1984), *cert. denied*, 469 U.S. 1113 (1985) (considered status of entity under state law and decisions; recognized one of the most important factors is whether a judgment will be paid from state treasury; considered whether entity has its own funds to satisfy judgment; considered whether entity is separately incorporated; considered degree of autonomy entity has over its own operations; considered whether entity has the power to sue and be sued and the power to enter into contracts; considered if entity is immunized from state taxation; considered whether state has immunized itself from effect of entity's operations and debts); *Cannon v. University of Health Sciences/The Chicago Medical School*, 710 F.2d 351 (7th Cir. 1983) (considered whether judgment will be paid from public treasury[4]); *Jackson v. Hayakawa*, 682 F.2d 1344 (9th Cir. 1982) (most critical question is whether judgment will impact on state treasury; considered whether entity has ability to sue and be sued; considered the corporate status of entity; considered the entity's ability to take property in its own name; considered how state law treats entity); *United Carolina Bank v. Board of Regents*, 665 F.2d 553 (5th Cir. 1982) (considered how state law treats entity; considered degree of control state exercises over entity;

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[4] This case does not contain a detailed discussion of other factors relevant to the Court's "alter ego" conclusion, but the *Kashani* case, supra, identifies other factors utilized by the 7th Circuit.

considered nature of governing body of entity; considered whether entity has the power of eminent domain; considered whether entity can own its own property; considered the source of funding; considered degree of state regulation over entity; considered ability of entity to raise own funding); *Rutledge v. Arizona Board of Regents*, 660 F.2d 1345 (9th Cir. 1981), *aff'd. sub. nom., Kush v. Rutledge*, 460 U.S. 719 (1983) (most important factor is source from which judgment will be paid; considered how entity is viewed by state law; considered whether entity has the power to sue and be sued; considered whether entity can take property in its own name; considered whether entity can conduct itself sufficiently independent of state); *Ronwin v. Shapiro*, 657 F.2d 1071 (9th Cir. 1981) (considered impact of judgment on state treasury; considered availability of insurance funds to pay judgments; considered the exercise of independent powers by entity[5]); *Perez v. Rodriguez Bou*, 575 F.2d 21 (1st Cir. 1978) (considered where entity obtains fiscal support; considered how entity's governing body is appointed); *Jagandin v. Giles*, 538 F.2d 1166 (5th Cir. 1976), *cert. denied*, 432 U.S. 910 (1977) (considered status of entity under state law; considered whether entity has the ability to sue and be sued; considered involvement of state in operation of entity; considered state's control over fiscal policies of entity; considered effect of judgment on state's fiscal autonomy; considered location of entity's funds in relation to other state funds); *Prebble v. Broderick*, 535 F.2d 605

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[5] *See, Rutledge*, supra, for other factors utilized by the 9th Circuit in its analysis.

(10th Cir. 1976) (considered impact of judgment on state treasury; considered source of entity's funding; considered entity's status under state law; considered manner of appointment of entity's governing body); *Brennan v. University of Kansas,* 451 F.2d 1287 (10th Cir. 1971) (considered status under state law; considered degree of control of entity by state; considered ownership of property by entity); *Walstad v. University of Minnesota Hospitals,* 442 F.2d 634 (8th Cir. 1971) (considered status under state law – here, state constitution declared entity an instrumentality of the state with immunities and protection).

Although the "alter ego" evaluations conducted by the various circuits, in the cases cited by Petitioner, do not use identical criteria or language, there is a *substantial similarity* among them. While some circuits may identify the criteria in more detail than other circuits, the thrust of the inquiry by all is the same:

> Will a judgment against the entity be paid from the state treasury and will the judgment interfere with the state's control of its own internal affairs?

In this case, the Third Circuit, *en banc,* analyzed the "alter ego" status of the Petitioner using criteria very similar to those utilized by the other circuits and fully consistent with the principles and guidelines established by this Court.[6]

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[6] Judge Becker, writing for the court en banc majority, wrote:

> "For clarity's sake, we divide the nine *Urbano* factors into three larger ques-

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These cases, when read together, reveal a common approach by the circuits for evaluating whether an entity is the "alter ego" of the state for Eleventh Amendment purposes.

There is no issue which requires review and guidance by this Court. The Circuit Courts of Appeals have, in following the opinions of this Court, developed criteria to determine whether an entity is the state's "alter ego."

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> tions: (1) Whether the money that would pay the judgment would come from the state . . . ; (2) the status of the agency under state law . . . ; and (3) what degree of autonomy the agency has." *Appendix to Petition for Certiorari* at 17a.

See also, Urbano v. Board of Mangers, 415 F.2d 247 (3d Cir. 1969), *cert. denied,* 397 U.S. 948 (1970); *Kovats v. Rutgers, the State University,* 822 F.2d 1303 (3d Cir. 1987); *Blake v. Kline,* 612 F.2d 718 (3d Cir. 1979), *cert. denied,* 447 U.S. 921 (1980), for other Third Circuit cases setting forth the criteria it uses when analyzing an entity to determine whether it should be given "alter ego" status.

It is interesting that this Court has twice before been asked to review the criteria used by the Third Circuit to evaluate an entity's "alter ego" status. The first case was *Urbano,* supra, where certiorari was denied at 397 U.S. 948 (1970). The second case was *Blake,* supra, where certiorari was denied at 447 U.S. 921 (1980). *Urbano* enunciated the criteria which the Third Circuit uses in its "alter ego" analysis, and *Blake* applied those criteria. *See,* 48 *U.S.L.W.* 3688 (4-22-80). The Third Circuit's analysis of "alter ego" matters was neither of sufficient national importance nor inconsistent with the rulings of this Court, or other circuits, nor did it raise a Rule 17 issue, when certiorari was denied in *Urbano* and *Blake,* and for the same reasons it should be denied in this case.

These criteria are substantially similar and uniform. The approaches to the question are not divergent, but homogeneous. Accordingly, no Rule 17 issue of national importance exists in this case. The Petition should be denied.

IV. Review Of This Case Invites Review Of Every "Alter Ego" Analysis Performed By A Lower Court. The Unique And Individual Facts Of This Case Do Not Warrant Granting Of Certiorari. The Third Circuit Court Of Appeals Followed This Court's Guidelines When Determining Whether New Jersey Transit Was Entitled To Eleventh Amendment Protection.

The Petitioner suggests that certiorari should be granted because the Third Circuit Court of Appeals, *en banc*, allegedly misapplied the "alter ego" criteria *to the facts of this case*. Even if this were true, a decision based on the unique factual analysis of a single case does not present issues of significant national concern and importance to warrant the granting of the Petition. If the Court examines this case, to determine whether a Court of Appeals, *en banc*, properly applied the legal standards to the peculiar situation involving this entity, then this Court invites review of every "alter ego" decision which will arise in the future. Our constitutional scheme does not intend for this Court to be burdened with second guessing myriad decisions based on the unique facts, statutes and governmental schemes involved in each case.[7] Accordingly, it is respectfully submitted, that this

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[7] Courts of Appeals, which have been called on to determine the "alter ego" issue, have found that each entity exists in

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Court should reject Petitioner's request that it become involved in a factual dispute. The Petition should be denied.

Furthermore, to correct any misunderstanding caused by the Petition, it is important to emphasize that the Third Circuit, *en banc's*, decision properly decided this case on its merits.

The Court of Appeals, *en banc*, determined that a judgment against the Petitioner would not impact on the State treasury. The majority noted that passenger fares accounted for $289 million of the $313 million in Petitioner's operating revenues; that less than one-third of Petitioner's operating funds came from the State; that the State has specifically disclaimed, and has fully immunized itself from liability arising from a judgment against the Petitioner; and that the State is under no obligation to pay Petitioner's debts or to reimburse it for judgments it pays. Further, the Petitioner can raise its own revenue and is authorized to purchase liability insurance to protect itself, and the State, from the effect of any judgment. Although the Petitioner's funds are described by state law as public, the majority notes that that designation is irrelevant as the public money designation also applies to the funds of counties and municipalities which are not entitled to Eleventh Amendment protection. *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S.

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a unique governmental context and that each must be considered on the basis of its own particular circumstances. *Long*, supra at 77; *Hall*, supra at 302; *United Carolina*, supra at 557. This is a role best suited to lower courts and not this Court.

274, 280-81 (1977). On balance, the majority found that the funding factor weighed strongly against "alter ego" status. *Petition Appendix* at pp. 18a-24a.

On the criterion of status under state law, the majority found that some factors weighed in favor of "alter ego" while other factors weighed against it. The majority concluded, "Because [Petitioner's] status under New Jersey law is uncertain, the analysis of this factor does not significantly help in determining whether NJT is entitled to immunity from suit in federal court." *Petition Appendix* at p. 25a. On balance, the majority found that these factors "tilted only slightly" in favor of "alter ego" status.[8]

Likewise, the majority analysis of the autonomy issue led to the conclusion that, although not "highly autonomous" as some entities, the Petitioner is still "significantly autonomous." The majority concluded that this issue also weighed only slightly in favor of immunity. *Petition Appendix* at pp. 27a-28a.

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[8] Petitioner insinuates that the New Jersey state courts have treated it as the "alter ego" of the State. The cases, listed in a footnote on p. 14 of the Petition, are actually irrelevant. These cases deal with a "public entity" exemption of the New Jersey Motor Vehicle Financial Security Act, 39 N.J.S.A. 6-54. The exemption applies to any "public entity" including a state, political subdivision, county or municipality. The cases conclude that Petitioner is a public entity under the Act. This conclusion has no bearing on the Eleventh Amendment "alter ego" issue because counties and municipalities, which are also exempted as public entities, are not entitled to "alter ego" immunity. *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977).

When balancing the funding factor which weighed heavily in favor of no Eleventh Amendment protection, against the other factors which just barely tilted in favor of protection, and when viewing these factors in the light of the Eleventh Amendment's purpose of protecting state treasuries from the effect of judgments[9], the majority found that the Petitioner was not entitled to Eleventh Amendment protection. *Petition Appendix* at p. 29a. Contrary to the Petitioner's assertion, this conclusion was not premised on an unrealistic understanding of the facts, but on an impartial and well-reasoned evaluation of the facts particular to this case. There was no error by the Third Circuit and its decision should not be reviewed. Accordingly, this Petition should be denied.

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[9] By protecting the state treasury the state's autonomy is also protected as a litigant cannot force a state to reallocate public funds as a result of its treasury's depletion due to payment of a judgment.

CONCLUSION

For these reasons, Respondents respectfully request that this Honorable Court deny Petitioner's Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

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